

Message Text

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PAGE 01 STATE 302190
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C O N F I D E N T I A L STATE 302190

BONN FOR WHITLOCK USBERLIN FOR SURENA

E.O. 11652: GDS

TAGS: PGOV, AKB, BQG

SUBJECT: REFERRAL OF CASE FROM BERLIN COURT TO FRG
CONSTITUTIONAL COURT (FCC)

REF: A) CHESTER/WHITLOCK TELCON DEC 19; STATE 301202;
USBERLIN 3179; USBERLIN 3176; BONN 20877

1. APPROACH TO FRG: DEPT BELIEVES FIRST PRIORITY
MUST BE TO GET FEDERAL CONSTIUTIONAL COURT (FCC) TO
DELAY ITS CONSIDERATION OF SOCIAL SECURITY CASE
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PAGE 02 STATE 302190

REFERRED BY BERLIN COURT TO AVOID FACING THE ALLIES
WITH FAIT ACCOMPLI. THEREFORE DEPT BELIEVES APPROACH
TO FRG IN BONN GROUP SHOULD PROCEED IMMEDIATELY
(STATE 301202).

2. APPROACH TO STOBBE: DEPT REGRETS THAT BRITISH
DELAY IN AUTHORIZING APPROACH TO STOBBE HAS MADE IT

IMPOSSIBLE TO SEEK SOME ACCEPTABLE SOLUTION IN TIME POSSIBLY TO AVERT NEED FOR FORMAL APPROACH TO FRG (PARA 1 ABOVE). NONETHELESS, WE BELIEVE DISCUSSION WITH STOBBE SHOULD PROCEED AS SOON AS POSSIBLE BOTH TO PREPARE BERLINERS FOR PROBABLY EVENTUAL NEGATIVE ALLIED DECISION AND TO EXPLORE OPTIONS, IF ANY, TO RESOLVE MATTER WITHOUT FCC RULING ON THE QUESTION REFERRED BY THE BERLIN COURT. OUR COMMENTS ON SPECIFICS FOLLOW.

3. DEPT AGREES WITH MISSION THAT IT WOULD BE STRONGLY PREFERABLE TO HAND TECHNICAL NOTE (USBERLIN 3179) TO STOBBE RATHER THAN TURNING IT OVER LATER TO SENAT LEGAL EXPERTS. ALTHOUGH WE ARE NOT CERTAIN THAT THERE IS THAT MUCH DIFFERENCE IN BURDEN OF PROOF TERMS BETWEEN HANDING TEXT TO STOBBE OR TO SENAT LEGAL EXPERTS (PARA 5, USBERLIN 3176), PROVIDING STOBBE THE TEXT WOULD DEMONSTRATE TO HIM THE SERIOUS THOUGHT WHICH THE ALLIES HAVE GIVEN THIS MATTER AND REINFORCE FOR HIM THAT, UNLESS THE GERMAN SIDE CAN FIND A WAY TO RESOLVE THE QUESTION WITHOUT AN FCC RULING, THE ALLIES MOST PROBABLY WILL HAVE TO ACT. IF ALLIES CAN AGREE TO TEXT OF TECHNICAL NOTE AND TO DELIVER IT TO STOBBE, PARA III OF STOBBE TALKING POINT (PARA 12, BONN 20877) SHOULD BE APPROPRIATELY REVISED. IF ALLIES CANNOT SO AGREE WITHIN REASONABLY

CONFIDENTIAL

PAGE 03 STATE 302190

SHORT TIME, WE BELIEVE IN VIEW OF APPROACH TO FRG (PARA 1, ABOVE) THAT APPROACH TO STOBBE SHOULD PROCEED WITHOUT TECHNICAL NOTE. IN THE LATTER EVENT, DEPT WOULD PREFER AMENDING PARA III OF THE STOBBE TALKING POINTS ALONG LINES SUGGESTED BY THE MISSION (PARA 3, USBERLIN 3176) TO LEAVE BURDEN OF PROOF POINT OPEN FOR FURTHER ALLIED DISCUSSION. HOWEVER, WE WOULD NOT WISH APPROACH TO STOBBE TO BE DELAYED SOLELY ON THIS GROUND.

4. DEPT FINDS TEXT OF TECHNICAL NOTE ACCEPTABLE WITH THE EXCEPTION OF PARA 7 AND 8 (USBERLIN 3179):

A. PARA 7: DEPT BELIEVES THE FINAL SENTENCE IS UNNECESSARY AND POTENTIALLY HARMFUL, AND SHOULD BE DELETED. IF CORRECT IT IS UNNECESSARY. HOWEVER, IF THE GERMAN SIDE SHOULD BE ABLE TO CITE SOME AUTHORITY IN PROCEDURAL REGULATIONS OR IN PRACTICE WHICH ADMITS OF THE POSSIBILITY OF A VOLUNTARY REFERRAL TO THE FCC, THEY COULD CITE THIS SENTENCE TO SUPPORT AN ARGUMENT THAT THE ALLIES HAD INDICATED THEY WOULD BE WILLING TO SANCTION THE REFERRAL WHICH MAY NOT BE THE CASE.

B. PARA 8: DEPT. BELIEVES IT WOULD BE PREFERABLE TO RECAST THIS PARAGRAPH SOMEWHAT (1) TO REMOVE ELEMENT OF "THREAT" WHICH CAUSES DIFFICULTY FOR THE BRITISH AND (2) TO MAKE CLEAR THAT, WHILE ALLIES ARE PREPARED TO GIVE FAIR HEARING TO GERMAN VIEWS ON QUESTION OF PROPRIETY OF REFERRING CASE TO FCC, OUR MAIN INTEREST IS TO DETERMINE IF SENAT CAN OFFER SOLUTION ON GERMAN SIDE WHICH WOULD RESULT IN FCC NOT CONSIDERING CASE. DEPT. BELIEVES PARAGRAPH ALONG FOLLOWING LINES WOULD BE APPROPRIATE IN PLACE OF PRESENT PARAGRAPH 8: "THE ALLIED KOMMANDATURA IS PREPARED TO CONSIDER ANY OBSERVATIONS ON THE FOREGOING WHICH THE LEGAL EXPERTS OF THE SENAT MAY HAVE. AT THE SAME TIME, WE WOULD APPRECIATE ANY
CONFIDENTIAL

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PAGE 04 STATE 302190

SUGGESTIONS WHICH THE SENAT MAY HAVE FOR RESOLVING THE MATTER WITHOUT A DECISION BY THE FCC OR FORMAL ACTION BY THE ALLIED KOMMANDATURA." IN THIS CONNECTION, WE BELIEVE THAT IDEA EXPRESSED IN PRESENT BRACKETED LANGUAGE COULD BE EITHER INCORPORATED IN TEXT OR PRESENTED ORALLY. VANCE

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